

MOTION FILED

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No. 90-1124

In The
Supreme Court of the United States
October Term, 1990

KEITH JACOBSON,
Petitioner,

— *against* —

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS,
FOR THE EIGHTH CIRCUIT

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC., AND THE
NATIONAL SHERIFFS' ASSOCIATION,
IN SUPPORT OF THE RESPONDENT.

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MOTION OF AMICI
CURIAE TO FILE BRIEF

Come now Americans for Effective Law Enforcement, Inc., et al., and move this Court for leave to file the attached brief as *amici curiae*, and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's

programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the national and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of initiating and conducting investigations within the bounds of the law, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, NDAA, and NSA, are national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding law enforcement conduct in the law of initiating investigations. Although Respondent is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* have reviewed the Brief for the United States in Opposition to the Petition for Certiorari and have conferred with counsel for Respondent in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel have requested consent of the parties. The consent of the Respondent has been received and filed with the Clerk of this Court. This Motion is necessary because the Petitioner has declined to grant consent to *amici curiae*.

For these reasons, *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICI

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ARGUMENT

I.

THE PETITIONER HAS NOT BEEN ENTRAPPED AS A MATTER OF LAW.

The court below, *U.S. v. Jacobson*, 916 F.2d 467 (8th Cir. 1990) (en banc), ruled that in the absence of government conduct so outrageous as to violate due process principles, there was no constitutional bar to the institution of a "sting" operation targeting a person who was not reasonably suspected of being predisposed to commit a crime. It held that a child pornography sting operation in which the government, acting without reasonable suspicion that the Petitioner, hereinafter referred to as the defendant, was predisposed to commit the crime of receiving child pornography through the mails, targeted the defendant, whose name was obtained from a pornography bookstore's list, mailed him sexual-attitude surveys, letters, and catalogs, and then fulfilled his order for sexually explicit materials involving juveniles, did not amount to outrageous conduct in violation of the Fifth Amendment's Due Process Clause and that the defendant was not entrapped as matter of law.

In fact, and in law, no constitutionally protected right of the defendant was violated in this case. He had no right to possess child pornography, and he had no right to be free

from investigation. He could prevail only if he could show that the government's conduct in sending him a few letters, surveys, and catalogs was so outrageous as to offend due process. Yet, as the court below observed, those actions were far less pressing inducements than those that typically occur between two persons in face-to-face meetings.

The en banc decision of the court below is in accord with the unanimous view of other circuits that the government need not have reasonable suspicion of criminal activity before beginning an undercover investigation. Those courts recognize that as long as the conduct of the investigation does not violate due process, the absence of reasonable suspicion at the outset of the investigation does not bar the conviction of someone who commits a crime. *United States v. Driscoll*, 852 F.2d 84 (1988); *United States v. Jenrette*, 744 F.2d 817, (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States v. Gamble*, 737 F.2d 853 (10th Cir. 1984); *United States v. Jannotti*, 673 F.2d 578 (3rd Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States v. Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980). Since the investigation in this case did not violate the defendant's due process rights, he cannot escape liability on the ground that the government might not have had reasonable suspicion of his criminal activity when it commenced its investigation.

II.

A RULE THAT LAW ENFORCEMENT AUTHORITIES MUST HAVE PARTICULARIZED SUSPICION BEFORE INITIATING INVESTIGATIVE ACTIVITIES WOULD UNDULY HAMPER, IF NOT CURTAIL, MANY LAW ENFORCEMENT INITIATIVES.

Amici would like to point out to this Court the deleterious practical impact of a rule requiring reasonable suspicion

before investigative activity commences, namely, that virtually all sting-type operations would be precluded by such an approach. Our special interest as law enforcement administrators and prosecutors is the avoidance of so restrictive a rule. It would basically shut down a major portion of present legitimate law enforcement activity.

Law enforcement agencies at all levels of government frequently have information that a particular form of illegal activity—such as narcotics trafficking, stolen automobiles, fencing of stolen property—exists, but with no firm suspects. A particular local agency may, for example, have a myriad of stolen car reports but no precise leads as to suspects. If it were necessary to have suspicion focused upon a particular individual before launching an investigation, such as a sting operation utilizing an automobile resale activity set up by the police to attract those with stolen cars to sell, law enforcement agencies could do little, if anything, to cope with criminal activity. Even if the police had information concerning a particular suspect but that information did not yet rise to the level of reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968), they would be powerless to act under the rule advocated by the defendant in this case.

While the instant case involved receiving pornography through the mails, probably the most useful aspects of sting operations have pertained to property offenses. According to the FBI Uniform Crime Reports, *Crime in the United States*, 1989, larceny-theft offenses accounted for 55% of the national Crime Index total, with theft of motor vehicle parts, accessories, and contents making up 38% of all reported larcenies. Yet, only 18% of such property crimes were cleared in 1989.

In order to cope with the lack of suspects in many cases, the police resort to sting operations or baited vehicle operations, such as that recently described in the article,

"Police Practices: Baited Vehicle Detail," May 1991 *FBI Law Enforcement Bulletin*, p. 24. This technique, employed by local authorities in Waycross, Georgia, involved "baiting" a vehicle with attractive items of personal property in plain view and within easy access of passersby, and leaving the vehicle "unattended" along a roadside (but with police nearby watching the vehicle while remaining out of sight). When passersby reached into the vehicle to steal an item such as a portable radio or TV, they were arrested. Operations of this type are undertaken without pre-existing reasonable suspicion focused upon a particular suspect. They are useful investigative techniques that would be threatened by a broad rule requiring the existence of reasonable suspicion prior to law enforcement investigative activity.

Amici respectfully submit that in fashioning a rule in the instant case the Court should keep in mind the urgent necessity of not adversely affecting sting and related operations. Such operations are not only necessary but are often remarkably effective. In the FBI article cited, it was noted that in 1989 62.5% of the baited vehicle operations employed by the subject agency resulted in arrests, and 100% of the cases involved adult offenders who were successfully prosecuted. Sting operations have proven to be successful and their deterrent effect upon those who are predisposed to commit similar crimes cannot be doubted. Thus, such techniques not only take offenders off the street but are preventative as well.

CONCLUSION

ACCORDINGLY, WE RESPECTFULLY REQUEST THIS COURT TO AFFIRM THE DECISION OF THE COURT BELOW ON THE BASIS OF LAW AND EQUITY BY HOLDING THAT THE GOVERNMENT DID NOT VIOLATE DEFENDANT'S RIGHTS IN THIS CASE, AND, MORE BROADLY, THAT LAW ENFORCEMENT OFFICERS DO NOT NEED REASONABLE SUSPICION BEFORE LAUNCHING AN INVESTIGATIVE ACTIVITY OF THIS OR RELATED TYPES.

Respectfully submitted,

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